THE MOTHER SUPERIOR OF THE DAUGHTERS OF CHARITY OF THE CANOSSIAN INSTITUTE (MALAYA) & ANOR v. DIRECTOR OF LAND TITLES, MALACCA & ORS

HIGH COURT MALAYA, MELAKA
MOHD RADZI ABDUL HAMID J
[JUDICIAL REVIEW NO: MA-25-2-05-2022]
3 MARCH 2025

Abstract – *Occupation and use of land, even over a long period, does not automatically establish legal and beneficial ownership. A mere expectation, without a clear promise or undertaking, does not create a legitimate expectation for legal entitlement.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against refusal and reluctance of land authorities – Applicants sought replacement and new indefeasible document of title – Allegation that claim supported by historical facts and documents – Land authorities reluctant and refused to grant and issue replacement – Whether error of fact and law in administration of land authorities' duties and obligations towards applicants – Whether land authorities' acts and decisions illegal, irrational and procedurally improper*

LAND LAW: *Title – Indefeasibility of title – Replacement and new indefeasible document of title – Title deed lost and never recovered – Claim based on historical facts and documents – Whether applicants had pre-existing legal and beneficial ownership – Whether applicants had legal expectation to obtain replacement title – Whether there was delay – Whether occupation and use of land for long period automatically established legal and beneficial ownership*

The Portuguese Mission had, since 1905, occupied and administered a piece of land ('Lot 6') in Malacca as a Convent and a school. The applicants stated that: (i) a title deed to Lot 6 was issued as Dutch title deed prior to coming into effect the National Land Code (Penang and Malacca Titles) Act 1963 ('Act'); (ii) the Dutch title deed to Lot 6, which was under the care of one Reverend Father Alvaro Martins Coroado ('Reverend Father'), was lost and never recovered; and (iii) the applicants claimed that they had a pre-existing legal and beneficial ownership interest in Lot 6 on the appointed day, as defined under the Act and was, therefore, entitled to a replacement and new indefeasible document of title. In 2014, the applicants made a request to the second respondent for the issuance of a continuance or replacement land title for Lot 6. A series of exchanges of letters took place between the first applicant and the second respondent. The second respondent expressed reluctance to accede to the application and the matter culminated in a letter by the second respondent stating that it did not have the necessary

jurisdiction to grant legal ownership of Lot 6 to the applicants since the Land Titles Appeal Board, which was initially established under the Act, had since ceased to act. Hence, the present application for judicial review, by the applicant, against the respondents' reluctance and refusal to grant and issue the replacement title as an error of fact and law in the administration of the respondents' duties and obligations towards the applicants. Through this application, the applicants sought: (i) a declaration that the second applicant was the legal proprietor of the land held under Lot 6 and held for and on behalf of the first applicant, the beneficiary; (ii) an order to vest all legal and/or registered interests in and to Lot 6 in favour of the second applicant. In the alternative, an order to vest all legal, registered and/or beneficial interest in and to Lot 6 in favour of the first applicant; and (iii) an order of *mandamus* compelling the first, second and/or third respondent to do and/or cause to be done all that was necessary to comply with provisions of the Act. The applicants submitted that: (i) the respondents should act consistent with the second respondent's admission, in the letters dated 3 June 2014 and 5 October 2018, that Lot 6 was registered in the name of the Portuguese Convent and therefore, issue the replacement title under the name of the applicants; and (ii) the applicants had the legitimate expectation that the respondents shall act to issue a replacement title and register the same in the name of either the applicant, pursuant to the provisions of the Act or, otherwise, pursuant to the order of this court.

Held (dismissing application):

(1) The applicants had not shown that, on the balance of probabilities, they had a pre-existing interest in the legal and beneficial ownership of Lot 6. This court did not find the existence of a pre-existing deed, as defined by the Act, evidencing or purporting to evidence any pre-existing interests in the legal and beneficial title to Lot 6. Whilst the historical evidence showed that the Portuguese Mission had set up the convent and school, the historical fact of occupation and use of land was not in itself sufficient to establish a legal and beneficial ownership interest in the land. (para 55)

(2) The letters dated 3 June 2014 and 5 October 2018 did not contain any promise or undertaking that the second respondent would unconditionally act to issue the replacement title to the applicants. In fact, in those letters and later communication from the second respondent leading to the final letter, the second respondent displayed a consistent position that they were not ready to issue a continuation or replacement title either due to the following: (i) lack of evidence supporting the applicants' claim; (ii) the mechanism for the disposal of any claim under the Act had since the expiry of 12 years from the appointed day become non-functional; (iii) the operation of s. 36 of the

Act on the extinguishment and replacement of existing interest; and (iv) Lot 6 was actually Crown or State land, as evidenced by the Collector of Land Revenue letter dated 26 February 1948 to the Senior Inspector of Schools, Malacca. Further, the fact of a long-term occupation itself did not evidence an acknowledgment or recognition of ownership that would give rise to such expectation. (paras 61-63)

(3) The delay between 18 to 26 years was nothing short of incredible. This court could not (i) believe that the applicants had to take all that time to come to a decision on what they should do under the law; and (ii) accept that the respondents' own predicaments, in resolving unclear claims lend credence to the applicants' own predicament in trying to resolve the claim amicably. The applicants would not have been in the predicament if they had acted in accordance with the provisions of the Act. Chapter 2 of the Act would have allowed the applicants to appeal against the decision of the Director if it was not in their favour. The applicants' failure to present their claim under the Act and their delay in litigating the claim showed that there had been acquiescence on the part of the applicants. The applicants had been in a long slumber and it was now too late for them to become aware of what they should have done. (paras 74 & 75)

(4) The applicants' inactivity had certainly caused a change in the respondents' position as they could not respond to the claims under the provisions of the Act and they would be disadvantaged to procure evidence that would probably had been more accessible had the claim been presented to the director. By virtue of s. 36 of Act, all pre-existing interest would extinguish on the appointed day and by coming into force of the National Land Code in 1965, any pre-existing interest the applicants may have had, had therefore been extinguished. (para 77)

(5) Lot 6 belonged to the Crown or State land. There was no evidence sufficient to point otherwise. Whilst the State may have had issued titles to other Christian institutions, each case must be judged on their own facts and circumstances. The respondents' acts and decisions were not illegal, irrational and procedurally improper. (paras 79 & 81)

Case(s) referred to:

Abdul Rahim Shariff v. Mustaffa Junid & Anor [1992] 3 CLJ 1389; [1992] 2 CLJ (Rep) 12 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Cahaya Ideal (M) Sdn Bhd v. Orang Orang yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC ***(refd)***

CAS v. MPPL & Anor [2022] 6 CLJ 713 HC ***(refd)***

A *Commisioner Of Land Titles, Penang v. Lim Theng Hoe [1988] 1 CLJ 115; [1988] 1 CLJ (Rep) 17 SC* ***(refd)***

Council Of Civil Service Union & Ors v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Country Garden Danga Bay Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor [2020] 4 CLJ 865 CA ***(refd)***

B *Hassan Jamaludin & Anor v. Saridah Ashaari & Ors And Another Appeal [2022] CLJU 39; [2022] 1 LNS 39 CA* ***(refd)***

Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors [1997] CLJU 424; [1997] 1 LNS 424 HC ***(refd)***

IB Capital Sdn Bhd v. Ivory Indah Sdn Bhd & Anor [2021] CLJU 2348; [2021] 1 LNS 2348 CA ***(refd)***

C *Kabra Holdings Sdn Bhd v. Ahmad Shahlan & Ors & Other Persons Unknown [1992] 2 CLJ 817; [1992] 2 CLJ (Rep) 609 HC* ***(refd)***

Khor Chen Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***

Malayan Commercial Banks Association v. National Union Of Bank Employees [1981] CLJU 91; [1981] 1 LNS 91 FC ***(refd)***

D *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC* ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***

Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor [2021] 10 CLJ 737 CA ***(refd)***

E *Piagamas Maju Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Selangor & Anor And Other Appeals [2016] 3 CLJ 224 CA* ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Sin Siang Hong v. Mau Yoon Swee [1985] 1 CLJ 240; [1985] CLJ (Rep) 297 FC ***(refd)***

Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA

F *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA* ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Teh Bee v. K Maruthamuthu [1977] CLJU 134; [1977] 1 LNS 134 FC ***(refd)***

Weng Lee Granite Quarry v. Majiis Perbandaran Seberang Perai [2020] 1 CLJ 34 FC ***(refd)***

G *Yap Chiew Guan v. The Trustee Of The Estate Of Yeap Chor Ee Deceased [1995] 4 CLJ 422 HC* ***(refd)***

YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] CLJU 244; [1978] 1 LNS 244 FC ***(refd)***

H *Yong Yin Siew v. Chong Sheak Thow [1988] 2 CLJ 569; [1988] 1 CLJ 378 HC* ***(refd)***

Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:

National Land Code (Penang and Malacca Titles) Act 1963, ss. 4, 6(1), 31(1), 32, 33, 34, 35, 36, 37, 38, 39, 53, 55(1)

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Other source(s) referred to:

Ainul Jaria Maidin, *Conversion from English Deeds System to Torrens System of Title Registration in Panang and Malacca: Process and Problems, Ainul Jaria Maidin,* [2007] 2 MLJ lii

For the plaintiff - Joy Appukuttan & Kelvynn Foo Wai Tzen; M/s KH Lim & Co
For the defendants - Nor Azizah Yusof; SLA

Reported by Lina E

JUDGMENT

Mohd Radzi Abdul Hamid J:

Matter

[1] This is a decision on an application by both applicants in encl. 17 for judicial review arising from the respondents alleged failure or refusal to grant and issue a replacement document of title for a piece of land known as Lot 6, Town Area XXVII, Melaka Tengah District, Melaka State ('Lot 6') and to register the same in the name of the applicants pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 ('application').

Background

[2] Since 1905, Lot 6 has been occupied and administered as a convent and a school by the Portuguese Mission. The Portuguese Mission or more completely known as the Agent of the Commission for the Administration of the Estates of the Portuguese Missions in China and Singapore was later incorporated under the Portuguese Commissions Ordinance 1910 ('Portuguese Mission'). The school known as the Portuguese Mission Girl's school or Tranquerah Girls' school was also known as the Portuguese Convent since many of the teachers were nuns of the Sisters of Canossia who came from Macau, a colony of Portugal at the material time and they resided on Lot 6. The Sisters of Canossa was later incorporated as The Mother Superior of the Daughters of Charity of the Canossian Institute (Malaya) pursuant to the Daughters of Charity of the Canossian Institute (Incorporation) Act 1957 ('Canossian Sisters').

[3] The school was later renamed and known as Convent of the Sacred Heart ('school'). The school has since became a national school known as Sekolah Kebangsaan Sacred Heart Convent Melaka and part of the Malaysian school system under the Ministry of Education. Thus, since 1905, Lot 6 and the school have been under the occupation, use and management of the Portuguese Mission and the Canossian Sisters.

[4] The applicants state that a title deed to Lot 6 was issued as a Dutch Title Deed prior to coming into effect of the National Land Code (Penang and Malacca Titles) Act 1963 ('the Act'). It is the applicants' case that the Dutch Title Deed to Lot 6 was under the care of one Reverend Father Alvaro

Martins Coroado ('Reverend Father Coroado') who was the Vicar of the St Peter's Church in Melaka. He represented the Portuguese Mission at the material time and he had supervised the Portuguese Convent. Reverend Father Coroado was captured by the Japanese army in 1943 and he subsequently passed away. The title deed to Lot 6 which the applicants say was under the Reverand's care was lost and never recovered.

[5] Based on their belief supported by historical facts and documents that a title deed for Lot 6 had in fact been issued when Reverend Father Coroado was alive, the applicants claim that they have a pre-existing legal and beneficial ownership interest in Lot 6 on the appointed day as defined under the Act and are therefore entitled to a replacement and new indefeasible document of title.

[6] In 2014, the applicants acting through their solicitors made a request to the second respondent for the issuance of a continuance or replacement land title for Lot 6. That communication was followed by a series of exchanges of letters between the first applicant's solicitors and the second respondent. The second respondent expressed reluctance to accede to the application based on a number of reasons which will be dealt with later. Those exchanges finally culminated in a letter dated 8 March 2022 issued by the second respondent. In that letter, the second respondent took the position that it did not have the necessary jurisdiction to grant legal ownership of Lot 6 to the applicants since the Land Titles Appeal Board which was initially established under the Act have since ceased to act and therefore the second respondent left it to the applicants to refer the application to court for determination.

[7] This application was filed after the applicants essentially view the respondents' reluctance and refusal to grant and issue the replacement title as an error of fact and law in the administration of the respondents' duties and obligations towards the applicants.

[8] Through this application, the applicants essentially seek the following reliefs:

(i) a declaration that the second applicant is the legal proprietor of the land held under Dutch Title Deed (DTD) particulars identified as Lot 6, Kawasan Bandar XXVII, Daerah Melaka Tengah, Melaka ("Lot 6") and held for and on behalf of the first applicant, the beneficiary;

(ii) an order to vest all legal and/or registered interest in and to Lot 6 in favour of the second applicant;

(iii) further and/or in the alternative to para. 2 above, an order to vest all legal, registered and/or beneficial interest in and to Lot 6 in favour of the first applicant; and

(iv) an order of *mandamus* compelling the first respondent, second respondent and/or third respondent do and/or cause to be done all that is necessary to comply with provisions of the Act.

The Applicants' Case

[9] The applicants contend that their application should be allowed for the following reasons:

(i) the applicants have a pre-existing legal and beneficial ownership interest in Lot 6;

(ii) the respondents' refusal to perform their legal duty to issue the replacement title is illegal;

(iii) the respondents' refusal to recognise the applicants' legal and beneficial interest in Lot 6 is unreasonable and/or irrational;

(iv) the applicants have a legitimate expectation that they will be vested with all the legal and registered interest and ownership in Lot 6; and

(v) the second respondent's decision through the letter dated 8 March 2022 was a procedural impropriety.

[10] In their endeavour to prove the applicants' pre-existing interest in Lot 6, references to and reliance were made on historical facts, records and documents. They include the following:

(i) the second respondent's Dutch Title Deed records which show that Lot 6 is registered in the name of the Portuguese Convent;

(ii) the straits settlement blue book for the years 1907, 1908, 1910 and 1938 that recorded that the Tranquerah Girl's School was run by the Canossian Sisters and supported by the Portuguese Mission;

(iii) the return of occupier of lands and buildings form dated 24 September 1959 which recorded that the Canossian Sisters are the owners of No 7, Bandar Hilir Road which is the site of Lot 6;

(iv) the certificate of completion by the Malacca Town Municipal Council dated 18 May 1965 which referred to Lot 6 as being for the Sacred Heart Convent

(v) the Rules of the Teachers Association of Malacca dated 1 January 1935 which identifies the Sacred Heart Convent as the Portuguese Convent;

(vi) an agreement dated 21 December 1935 between Reverend Father Coroado acting as representative of the Portuguese Mission and the Municipal Commissioners of the Town and Fort of Malacca for permission to erect a temporary building at the Portuguese Convent;

(vii) Survey Department of the Federation of Malaya No 63-1953 and the Government of Malaysia survey plan *vide* Gazette Notification MLN 63 of 23 December 1965 dated 19 January 1978 which identified Lot 6 as the Portuguese Convent;

(viii) the first-class survey of Lot 6 Town Area XXVII with approved plan no 5178 examined dated 2 August 1949 by the Survey and Mapping Department, Malaysia (JUPEM) refers Lot 6 as the Portuguese Convent;

(ix) the first applicant's letter dated 17 March 1922 to the Collector of income Tax, Singapore states that the Portuguese Convent Bandar Hilir is a property registered in the name of the first applicant; and

(x) the second respondent's letters dated 3 June 2014 and 5 October 2018 wherein the second respondent had confirmed that based on their records Lot 6 belongs to the Portuguese Convent.

[11] The applicants also brought to the attention of this court a fact concerning another plot of land known as Lot 74 (Hakmilik PN 12383 Lot 74 Kawsan Bandar XXVII, Melaka Tengah, Melaka) which sits adjacent to Lot 6 wherein part of the School resides.

[12] That land was originally leased to the Portuguese Mission and in 2002 a leasehold title was issued in its name. Since the Portuguese Commission who was the administrator of the Portuguese Covent alias Sacred Heart Convent was recognised under the Act as the owner of Lot 74 then there can be no valid reason why the Portuguese Mission and on the same score the Portuguese Convent alias Sacred Heart Covent should be denied ownership of Lot 6. It would not make sense for the respondents to recognise ownership of Lot 74 where one part of the school resides and deny ownership of Lot 6 where the other part of the school sits. Thus, it justifies for the sake of uniformity and consistency for the applicants to own both Lots 74 and 6. After all, it was the first applicant who has been paying for all outgoings arising from and incidental to Lot 6 and the buildings constructed on it.

[13] Based on the above considerations, the applicants argued that the respondents should act consistent with the second respondent's admission in the letters dated 3 June 2014 and 5 October 2018 that Lot 6 is registered in the name of the Portuguese Convent and therefore, issue the replacement title in the name of the applicants. It is argued that those letters when considered with all other documents are sufficient to prove the applicants' entitlement and ownership to Lot 6. Hence, the applicants claimed to have the legitimate expectation that the respondents shall act to issue a replacement title and register the same in the name of either applicant pursuant to the provisions of the Act or otherwise pursuant to the order of this court.

[14] The respondents' reluctance and refusal to issue the replacement title for reasons that: A

(i) Lot 6 is actually registered under the name of the Portuguese Convent and not in the name of either applicants disentitles the applicants from owning the land;

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(ii) the land is Crown or State land and not owned by the applicants, and the applicants had failed to register its interest in the Interim Registry under the Act;

(iii) the respondents are no longer empowered to act to issue a replacement title since the Land Titles Appeal Board under the Act have ceased to exist and operate; and C

(iv) there has not been any new appointments of the Director of Land Titles or Deputy Director of Land Titles under s. 6(1) of the Act who would have the power to act under the Act are therefore irrational, illegal and procedurally improper. D

[15] In support of the applicants' case, reference was made to the decisions in *Council Of Civil Service Union & Ors v. Minister For The Civil Service* [1985] AC 374; *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317; *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor* [2021] 8 CLJ179; *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145; *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145; *Malayan Commercial Banks Association v. National Union Of Bank Employees* [1981] CLJU 91; [1981] 1 LNS 91; [1981] 2 MLJ 183; *Sin Siang Hong v. Mau Yoon Swee* [1985] 1 CLJ 240; [1985] CLJ (Rep) 297; [1985] 1 MLJ 422 and *Yap Chiew Guan v. The Trustee Of The Estate Of Yeap Chor Ee, Deceased* [1995] 4 CLJ 422. E F

Respondents' Opposition G

[16] In opposing the application, the respondents argue, *inter alia*:

(i) the applicants have failed to provide any documentary evidence of a pre-existing interest in Lot 6 for a claim to be made under the Act;

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(ii) the letter 3 June 2014 only went so far as confirming that Lot 6 was registered in the name of Portuguese Convent and that either applicant still had the duty to discharge the burden of proving that they had legitimate right and ownership in Lot 6 which they have not;

(iii) the Dutch Title Deed register was actually a lot index which merely served to show the category of building on the land, *ie*, Portuguese Convent and not the ownership; I

(iv) the applicants failed to register their claim in the interim register on or before 1 January 1966, the appointed day under the Act ('appointed day') and accordingly to apply for a replacement title pursuant to ss. 35 to 39 of the Act;

(v) alternatively, the applicants failed to act pursuant to s. 53 of the Act to file the requisite Form E under that provision to present a claim as a party who had any pre-existing interest in any holding in respect of which no corresponding replacement title or interest is entered in the interim register;

(vi) Lot 6 has always been crown land and never registered under the Portuguese Convent;

(vii) the Canossian Sisters were only the administrators of the Portuguese Convent and the fact that they had been occupying the land with no registration as beneficial owners does not grant them any interest capable amounting to ownership;

(viii) all the survey plans referred to by the applicants merely refer to land or building usage and did not amount to legal documents of title;

(ix) the first respondent's ownership of Lot 74 cannot extend to Lot 6 as the first respondent's right to Lot 74 was clearly established under the deed of lease dated 28 May 1951 which was then entered in the interim register of the Act but there is no such similar deed or instrument for Lot 6;

(x) the applicants cannot rely on s. 88 of the Act on indefeasibility of title since there is no evidence of title or pre-existing interest in the interim register for Lot 6; and

(xi) the applicants have been guilty of inordinate delay, laches or acquiescence when they failed to act expediently under the provisions of the Act on or before expiry of 12 years from the appointed day and waited until 2014 to make their claim.

[17] In support of the respondents' arguments reference was made to the decisions, *inter alia,* in *Weng Lee Granite Quarry Sdn Bhd v. Majiis Perbandaran Seberang Perai* [2020] 1 CLJ 34; [2020] 1 MLJ 211; *Abdul Rahim Shariff v. Mustaffa Junid & Anor* [1992] 3 CLJ 1389; [1992] 2 CLJ (Rep) 12; *Commisioner Of Land Titles, Penang v. Lim Theng Hoe* [1988] 1 CLJ 115; [1988] 1 CLJ (Rep) 17; [1988] 1 MLJ 24; *CAS v. MPPL & Anor* [2022] 6 CLJ 713; [2022] MLRHU 1141; *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323; *Hassan Jamaludin & Anor v. Saridah Ashaari & Ors And Another Appeal* [2022] CLJU 39; [2022] 1 LNS 39; [2022] 3 MLRA 76; *Piagamas Maju Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Selangor & Anor And Other Appeals* [2016] 3 CLJ 224; and *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269.

Law On Judicial Review

[18] The Court of Appeal in *Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* [2021] 10 CLJ 737; [2021] 6 MLJ 750; [2021] 6 MLH 750; [2022] 1 MLRA 96 had discussed at length on the scope of the court's power of judicial review. Referring to the Federal Court decisions in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537 and another decision of the Court of Appeal in *Country Garden Danga Bay Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor* [2020] 4 CLJ 865; [2020] MLJU 81, the Court of Appeal opined that the scope of a judicial review is not limited just to procedural issues but also extends to the merits of a decision (see also *Ranjit Kaur S Gopai Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2012] 6 MLJ 1).

> [72] First, it should be remembered, as explained earlier, not only the process of arriving at the decision that the first respondent did is subject to review but the merits of that decision may also be subjected to scrutiny.

[19] The Court of Appeal in *Nazrul Imran* went on to hold that apart from the grounds of illegality, irrationality and procedural impropriety, a judicial review also includes determining whether the decision appealed from is proportional to the matter complained of. Reference was made to the Federal Court decision *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750.

> [57] Thus, based on the above authority, to reiterate, the four grounds upon which the decision of the first respondent may be challenged by way of judicial review are as follows:
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> (i) illegality;
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> (ii) irrationality;
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> (iii) procedural Impropriety; and
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> (iv) proportionality.

Deliberations

The National Land Code (Penang And Malacca Titles) Act 1963

[20] Before delving into the merits of the application, it would be necessary to briefly touch on the Act as the legislation sitting at the core of the issues raised by the applicants and respondents.

[21] Now, "since the 19th century, in both Penang and Malacca, which were recognised as the colony of the straits settlement, the English deeds system of conveyancing was implemented. The Indian Act No. XVI of 1839 provided the framework for the procedure to be followed by land officers, for the issue of titles, the collection of land revenue and the registration of

transfers. It was not until Act No. XXVI of 1861 that customary lands in Malacca were regulated. Local legislation and the three Charters of Justice modified the English deeds system. In the 1880's the straits settlements, government decided to amend the existing system. One reason for this was that land revenue receipts did not correspond with land development in the colony. It was thought that improvement to the system of land regulation would help improve the collection and quantum of land revenue. In 1883, Maxwell the then Commissioner for Lands proposed that a complete and accurate survey of the colony be undertaken as a preliminary measure to enable the adoption of Torrens system speedily. A series of enactment were passed following Maxwell's report but the Enactment did not produce a Torrens scheme. This series of legislation was amended from time to time but remained in force until 1966 when the Penang and Malacca Titles Act 1963. The Penang and Malacca Titles Act 1963 came into force on 1 January 1966 simultaneously with the National Land Code 1965' (see article by Ainul Jaria Maidin on *Conversion from English Deeds System to Torrens System of Title Registration in Penang and Malacca: Process and Problems, Ainul Jaria Maidin* [2007] 2 MLJ lii).

[22] Reference is made to the decision of the Federal Court in *Weng Lee Granite Quarry v. Majlis Perbandaran Seberang Perai* [2020] 1 CLJ 34; [2020] 1 MLJ 211 where the court had the opportunity to deal with the scope and application of the Act:

> [26] In 1963, steps were taken to assimilate the land laws in the Straits Settlement (Penang and Malacca) with the other Malay States. In particular, a uniform system for registration of land dealings (*ie*, the Torrens System) was sought to be introduced across Malaysia. This led to the enacting of the 1963 Act which is a legislation to provide for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the NLC, and for matters incidental thereto (see preamble of the Act). The 1963 Act provided, amongst others, for replacement titles with similar rights and interests to be issued to all landowners in Penang to replace the existing land deeds (see s. 36).
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> [27] During the assimilation process with the other Malay States, special provisions had to be introduced to maintain the existing rights of landowners in the Straits Settlement ...

[23] The Act "... provided a change-over in Penang and Malacca to the Torrens System which was in force throughout the other non Peninsular Malaysian States. Pending formal survey of the land, replacement titles were to be used for land formerly held under the deed system" (see *Malaysian Land Law and Procedure* by AinuI Jaira Maidin and Sharifah Zubaidah Syed Abdul Kadeer, Sweet & Maxwell, 2020). The Act makes provisions for all holdings and interests existing prior to the 1 January 1966 being the appointed day

to be noted on the interim register. The interim register serves to record all details of ownership of land and interest existing on the land immediately prior to the appointed day. Sections 25 and 26 stipulates that all dealings following the appointed day are to be registered on the titles on the interim register. Sections 31 to 34 of the Act provides for how the interim register shall be prepared and maintained.

[24] Replacement titles will be issued under the Act and subsequently cancelled and substituted with final documents of title under the new National Land Code. Following the registration of holdings and pre-existing interest in the interim register s. 36 provides that upon the appointed day, all pre-existing interests in all lands in the State shall be extinguished and there shall be vested in all persons in whom were vested such corresponding interests in the holdings created in relation to such lands under the Act, and the right to such replacement titles to such holdings.

[25] Now in the case of a party who claims that he has a pre-existing interest in a holding with no corresponding replacement title or interest entered in the interim register, s. 53 of the Act provides that such person can present a claim to the Director in the prescribed Form E. The Director shall then endorse on the appropriate folio of the interim register, investigate and dispose of such claim. Section 55 empowers that the Director may refer to court to determine any of the matters stated in s. 55(1) including the performance of the Director's duties or powers; any question of law or the construction of any instrument or the extent of any rights or interest or authority; and pertaining to the registration of interest in the interim register.

Have The Applicants Shown That They Have A Pre-existing Interest?

[26] The applicants contend that they have shown a pre-existing interest in Lot 6 in accordance with the provisions of the Act through historical facts and documents. In particular, the applicants rely on the survey plans, the Dutch Title Deeds for Lot 6 and the respondents' admission in the letters dated 3 June 2014 and 5 October 2018

[27] Having perused the evidence, this court accepts that the historical facts sufficiently show that Lot 6 has been occupied by the Portuguese Convent and administered by the Canossian Sisters under the patronage of the Portuguese Commission. This court also finds that it is an indisputable fact that the Portuguese Convent which was also known as the Sacred Heart Convent had occupied the land since 1905. This court also finds that the Portuguese Convent and the Sacred Heart Convent school had been recognised as landmark in Melaka evident from the historical documents referred to by the plaintiffs.

[28] However, there should not be any confusion as to what or whom the Portuguese Convent refers to. In this court's view, the name Portuguese Covent in essence refers to the type or usage of a building where the Cannosian Sisters were housed, convent activities undertaken and where the school was founded and operated under the patronage of the Portuguese Commission. Therefore, it would be wrong to equate the Portuguese Convent or the school as being the same as the Canossian Sisters or the Portuguese Mission. The former is a site or building whilst the latter are bodies or congregation of persons. They are distinct. This distinction will be material in this court's evaluation later.

[29] Whilst this court accepts that the applicants have been in possession and occupation of the land since 1905, possession or occupation is not synonymous with ownership. They are distinct legal rights. It is an accepted position under the law that a party's long term occupation and use of land does not necessarily confer on that party ownership interest over such land even if such party had been paying quit rent, assessment rents and utility bills (see *Teh Bee v. K Maruthamuthu* [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 6; *Cahaya Ideal (M) Sdn Bhd v. Orang Orang yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257; [1999] MLJU 125; *Yong Yin Siew v. Chong Sheak Thow* [1988] 2 CLJ 569; [1988] 1 CLJ 378; [1988] 3 MLJ 115; *Kabra Holdings Sdn Bhd v. Ahmad Shahlan & Ors & Other Persons Unknown* [1992] 2 CLJ 817; [1992] 2 CLJ (Rep) 609; [1990] MLJU 8; and *Hotel Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] CLJU 424; [1997] 1 LNS 424; [1997] 4 MLJ 601).

[30] These applicants claim that the deed to Lot 6 was lost and that they are now just seeking a replacement title. To succeed, the applicants must prove on the balance of probabilities that based on available evidence either of them had a pre-existing interest under the Act as the legal and beneficial owner of Lot 6.

[31] Section 4 of the Act defines "interest" in relation to land means any interest in land recognised as such by law, and includes an estate in land, "pre-existing" as in existence immediately before and not having lapsed or expired before the appointed day and "pre-existing interest" as all interests, rights, titles and estates (not being interests, rights, titles or estates vested in the Yang di-Pertua Negeri or the Government of the State) subsisting immediately before the appointed day in any land in the State, including any title therein acquired by adverse possession or operation of law or under any unregistered pre-existing deed.

[32] After carefully considering all the historical facts and documents, this court finds as an early observation that it was perhaps unlikely that the title deed would have been issued in the name of the first applicant since at the relevant time, the body that represented the interest of the Church and who

oversaw the Portuguese Convent was the Portuguese Commission or the Agent of the Commission for the Administration of the Estates of the Portuguese Missions in China and Singapore as evidenced by the Blue Book of the straits settlement (exh. A6, encl. 3), the letter dated 17 March 1922 to the Collector of Income Tax of Singapore (exh. A1, encl. 3) and the deed of lease dated 28 May 1951 with the High Commissioner of the Federation of Malaya for the lease of Lot 74 and record of ownership (exh. A25, encl. 3). In all probabilities, such deed if in fact was issued would have likely been in the name of the Portuguese Mission. Having stated that however, for the purposes of this decision, both applicants will be referred to in this court's deliberations.

[33] The applicants submit that the evidence of the applicant's pre-existing interest can be found in the letter dated 17 March 1922 to the Collector of Income Tax (exh. A11, encl. 3), the Dutch Title Deed register (exh. A15, encl. 3), the various survey reports (exhs. A16 and A17, encl. 3), payments of outgoings arising from and incidental to Lot 6 and the buildings thereon (exh. A19, encl. 3) and the fact of the applicants' continuous occupation of the land since 1905 till present save for the period during the Japanese Occupation of Malaya.

[34] The respondents, on the other hand, dispute that such documents serve as evidence or confer any interest of ownership in the land on the grounds that the letter dated 17 March 1922 is not an instrument of title, the Dutch Title Deed register merely referred the Portuguese Covent as a category or type of building rather than a document of title; and the survey reports merely served to identify Lot 6 as a surveyed and demarcated land on which the Portuguese Convent was situated and the payments of outgoings were for the buildings but not the land itself.

[35] The respondent seeks to disprove the applicants' claim by referring to a letter dated 26 February 1948 (exh. ZAR2, encl. 22) issued by the Collector of Land Revenue to the Senior Inspector of Schools, Malacca which stated that "the land on which the Portugese Settlement stands is Crown Land. The license at a nominal rental of $1 per annum". The respondent argued that based on that letter, Lot 6 actually sits on Crown or State Land and not privately held by the Portuguese Convent. The applicants argued on the other hand that the letter actually refers to Lot 287 situated in Town Area XXVII in the Portuguese Settlement where the Canossa Convent Secondary School is located and not Lot 6. This was explained in the applicant's affidavit in reply in encl. 27. Having considered the evidence, this court accepts that the said letter did not refer to Lot 6 and is therefore not relevant to be considered in favor of the respondents.

[36] Pausing there for a moment, it is necessary at this juncture to return to the provisions of the Act. Section 31(1) of the Act imposes a duty on the Director to prepare and maintain an interim register of all holdings in the State. The interim register is said to be the 'Cardinal feature' of the Penang and Malacca Titles Act 1963 and it is to, 'provide a permanent record of the state of title on the appointed day-or photograph, as it were, of the situation established by the old system of conveyance immediately before that system was extinguished – and a record of subsequent dealings, but it will also be the foundation on which the new document of titles will ultimately be issued.' (see *Ainul Jairul Maidin* (*supra*)). The interim register is used to note details of ownership of land and interests existing immediately prior to the appointed day. Dealings following the appointed day are to be registered on the titles in the interim register.

[37] The Register shall consist of a series of folios compiled in the serial order of the lot numbers allotted to the holdings included therein. In preparing this register, the Director is equipped with all the necessary powers as provided in ss. 9 and 25. Those powers include as follows:

(i) the powers to inspect and take copies of all records, plans and other documents relating to such holdings available in the office of the Director of Survey, in the Registry of Deeds, the registry of mutations of title, the land office, and any other public office in the State;

(ii) to enter any land for purposes of survey and demarcation, purpose of satisfying himself of the validity of any title or interest in land; and

(iii) to call upon the holder, to conduct enquiries of any title or interest in land to produce for inspection by him any document of original title or other deed or document in his or their possession.

[38] As far as Lot 6 is concerned, it would have been the duty of the Director to register any holdings in Lot 6 in the interim register. "Holding" is defined under the Act as a piece of land, but not being mining land or State land that is duly surveyed on the appointed day being delineated on a plan certified by or on behalf of the Director of Survey as a lot or lots delimited by right-line boundaries. Now based on the documents presented to this Court, there had already existed a survey and delineation of Lot 6 as shown by the first class survey of Lot 6 Town Area XXVI1 with approved plan no 5178 examined dated 2 August 1949, Survey Department of the Federation of Malaya No 63-1953 and the Government of Malaysia survey plan *vide* Gazette Notification MLN 63 of 23 December 1965 dated 19 January 1978.

[39] What is apparent to this court is that whilst Lot 6 is proven to have been surveyed and delineated, there is no evidence that there has been included in the interim register a holding in the name of the applicants. The applicants argued the fact that the survey plans in particular the first class survey of Lot 6 Town Area XXVII with approved plan no. 5178 examined

dated 2 August 1949 and Government of Malaysia survey plan *vide* Gazette Notification MLN 63 of 23 December 1965 dated 19 January 1978 identified that plot under the name Portuguese Convent must mean the State had recognised that Lot 6 did belong to the Portuguese Convent. Since the convent is administered and ran as a school by the Canossian Sisters for the Portuguese Commission, thus either applicant would have the right to be registered as its owner.

[40] However, it must be said that a survey and delineation of land by a public authority is not *prima facie* evidence of ownership. The evidence of ownership comes in the form of a deed of title or some other instrument capable of showing legal and beneficial ownership in the land. Section 35 of the Act stipulates that each folio of the interim register shall contain particulars prescribed in Form D. Form D which is found under the First Schedule of the Act provides for insertion of information regarding area, holding number, original tenure, replacement title and proprietor. Thus, it would have been expected that when the interim register was prepared, there would have been information on who are the proprietors of Lot 6 if indeed there was and if there was a proprietor, then by ss. 35, 36, 37, 38, a replacement title would then be issued to such proprietor.

[41] The fact of the matter is that no replacement title has been issued for Lot 6 and going by the process described above, it must mean that there must have been no information in such folio and Form D of any proprietors for Lot 6. It is therefore untenable for the applicants to argue that for some reason the respondents failed to open a folio.

[42] To use Lot 74 as an example, the second applicants' ownership arose out of a deed of lease dated 28 May 1951 initially entered between the second applicant and the High Commissioner of the Federation of Malaya pursuant to the Crown Lands Ordinance. With the coming into effect of the Act, the deed must have been entered in the interim register together with Form D and later a document of leasehold title was issued. The same cannot be said for Lot 6 and this makes the applicants' claim that there was a title deed for Lot 6 in the name of the Portuguese Commission weak.

[43] Continuing on, this court does not find the letter dated 17 March 1922 from the second applicant to The Collector of Income Tax, Singapore (exh. A11, encl. 3) serves as evidence of ownership. That letter just states the immoveable properties owned by it without any evidence of ownership. To add, the Portuguese Convent was only referred as premises and not as Lot 6, Town Area XXVII which would have been more accurate if the claim of ownership was over the land and not merely the premises. Thus, it is unclear whether the claim of ownership was made to the convent building or the land on which it sits.

[44] Further, this court does not find that the Malacca Municipality Notice of Assessment dated 24 September 1959 (exh. A28, encl. 27) is necessarily evidence of ownership. That notice is issued to a party who is the occupier of land or house. In fact, the second page of that notice refers to premises situated at No 7, Bandar Hilir, Malacca and not the land. It refers specifically to the building that is the Sacred Heart Canossian Convent.

[45] With reference to the agreement dated 21 December 1936 between Reverend Father Coroado and the Muncipal Commissioners of the Town and Fort of Malacca for permission to build a building which was a garage (exh. A13, encl. 3), it should be noted firstly, that the agreement was entered into in the personal name of Reverend Father Coroado and not on behalf of the Portuguese Commission and secondly, nowhere in the agreement stated that the Portuguese Commission is the owner of the land upon which the garage is to be built although it is to be situated at the Portuguese Convent. Thus, this document does not in any way evidence ownership of Lot 6.

[46] On the same basis, this court does not find that the letter dated 23 December 1948 from the Diocese in Macao to the tax authorities in Singapore (exh. A11, encl. 3) is also proof of ownership of Lot 6. Reading that letter in its entirety, this court does not find that the said letter speaks of ownership but rather on the activities of the missions including having charge of the named institutions including the Sacred Heart Convent in Malacca. More importantly, that letter addresses the Diocese's concerns that funds of the missions that are devoted to works of charity are subject to tax. This can be seen from the concluding paragraph of that letter that expressed the hope that the estate of the missions may be exempted from tax.

[47] That brings us to what the applicants argue to be the Dutch Title Deed in exh. 15, encl. 3. The respondents through Siti Mazlina binti Maidin (Assistant Registrar of Land Titles) (encl. 23) and Noor Helmy bin Noordin (Director of Survey and Mapping for Melaka (encl. 23) had explained that:

(i) Lot 6 was previously known as Lot 1259;

(ii) exhibit 15, encl. 3 is a lot index document which was prepared by the Registrar of Land Titles Melaka after plan number PA 5178 was prepared and approved on 2 August 1949 when Lot 1259 was re-identified as Lot 6;

(iii) the surveyed plan PA 5178 as shown by the applicants in exh. A16, encl. 3 did not identify any party as being the owner of Lot 6 but merely to describe the type of building which is the Portuguese Convent;

(iv) the lot index is not a document of title; and

(v) Lot 6 has always been Crown or State Land.

[48] After having considered the documents and arguments, this court accepts as argued by the respondents that exh. A15, encl. 3 merely served to record particulars on usage of land or building on Lot 1259 which later became known as Lot 6 and not as a document of title or evidencing ownership. The remark "Dutch Title Deed (Title Deeds not seen at Macao)" in that register supports that finding for it was otherwise, such remark would have been unnecessary. This court also observes that whilst the category of title is referred to as Dutch Title Deed, there are no transactions registered or recorded in connection to that land. Particularly, with reference to the date when the plan was approved on 2 August 1949, there had been no transaction registered or recorded before that date.

[49] Next are the letters dated 3 June 2014 (exh. A21, encl. 3) and 5 October 2018 (exh. A23, encl. 3) wherein the second respondent appeared to have admitted that Lot 6 belongs to the Portugues Convent which the applicants claim is conclusive proof of the applicants' legal and beneficial ownership in Lot 6. Having considered the letters and guided by this court's earlier discussions, this court does not agree that the letters ought to be read in such light.

[50] As stated earlier, there should not be any confusion between who or what is the Portuguese Convent, the Portuguese Mission and the Canossian Sisters. Since this court opines that the Portuguese Convent referred only to the land use or building, then the second respondent's so-called admission cannot be faulted as far as it relates to the fact of the Portuguese Convent being the type of building or use on Lot 6. Therefore, para. 2 of the letter dated 3 June 2014 where it stated that "... berdasarkan semakan Pentadbiran ini mendapati hakmilik Lot 6 ... adalah hakmilik Portugese Convent sepertimana tertera di dalam rekod hakmilik Pentadbiran ini" must be construed in that context and cannot amount to a confirmation or acknowledgement of the applicants' ownership in Lot 6. The second respondent's stand that the applicants must still prove their pre-existing interest is therefore not an irrationality and unreasonable.

[51] In any case, such letter cannot bypass or overcome any express provision of the law, and the provision of the law under the Act states that a person who claims to have any pre-existing interest in any holding in respect of which no corresponding replacement title or interest is entered in the interim register, must present a claim under s. 53 to the Director in Form E. Thus, a replacement title is not issued just because there has been some kind of admission arising from the exchange of correspondences but only after all the processes as required by the law have been complied with and completed in favour of the claimant. More on this will be discussed later.

[52] Paramount, is the matter of a pre-existing deed or instrument which in this court's view exh. A15, encl. 3 is not. Neither is it a register of title. As explained by the respondents and as evident from the face of the document it is just a lot index. The applicants seek to rely on the case of *Sin Siang Hong v. Mau Yoon Swee* [1985] 1 CLJ 240; [1985] CLJ (Rep) 297; [1985] 1 MLJ 422 where it was held that a person can acquire a pre-existing interest in land even from an unregistered pre-existing deed.

[53] In *Sin Siang Hong*, the claimant had in 1948 purchased properties from the owner. A bill of sale was executed but was lost. The owner never registered the sale. In a claim made for a replacement title based on a pre-existing interest under the Act, the Commissioner made a finding of fact that the claimant had in fact purchased the property and therefore had a pre-existing interest in the properties although the sale agreement was lost. The applicants argued that the decision in that case supports the applicants' contention that even though the title deed to Lot 6 was lost it should not stop the applicants from acquiring a pre-existing interest.

> ... in being satisfied that Mau had a pre-existing interest in the dispute land, the Commissioner, *inter alia*, made the following relevant findings:
>
> (a) Land holding No. 114T/A. XXXVII originally to Chew who later sold the land to Mau during the B.M.A. for £500 (British currency);
>
> (b) The Bill of Sale was not registered with the Land Office because Chew (who died on 30 July 1971) refused to do so as he felt the value of the land which he sold was too low;
>
> (c) Unfortunately, the Bill of Sale was missing from the custody of Mau;
>
> (d) As Chew refused to register the transfer of the said land, Mau made a Statutory Declaration which was registered with the Registry of the Land Office as Regd. No. 2892 of 1965, claiming for pre-existing title for 22 years.

[54] Now, as far as the decision in *Sin Siang Hong* is concerned, it must be stated that the Commissioner had made a finding of fact that the claimant had in fact acquired the properties under the bill of sale and therefore acquired an interest in the properties. In comparison, apart from historical facts and documents showing the fact of occupation and land use, this court does not find that any document that clearly points to the applicants' legal title to Lot 6 and that it was registered in either applicant's name.

[55] Thus, based on the discussions above, this court does not find that the applicants have on the balance of probabilities showed that they have a pre-existing interest in the legal and beneficial ownership of Lot 6. This court does not find the existence of a pre-existing deed (as defined by the Act) evidencing or purporting to evidence any pre-existing interests in the legal and beneficial title to Lot 6. Whilst this court accepts that the historical

evidence shows that the Portuguese Mission had set up the Portuguese Convent and the Sacred Heart School run by the Canossian Sisters, the historical fact of occupation and use of land is not in itself sufficient to establish a legal and beneficial ownership interest in the land.

Legal Expectation

[56] The applicants argue that they have a legal expectation to obtain the replacement title based on the fact of:

(i) the historically long occupation and use of the land; and

(ii) the respondents' admission in the letter dated 3 June 2014 and 5 October 2018 that the ownership of Lot 6 was in the name of the Portuguese Convent.

[57] In *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; [2009] 3 MLJ 452, the Court of Appeal held that a legitimate expectation arises where a person responsible for taking a decision has induced someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken.

> [32] A common trait in ail these cases is that the aggrieved parties stand in direct relationship – without any go-between – with the decision makers. The expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edn. paras 8-37.

[58] Additionally, in *Zakiah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77; [2005] 6 MLJ 517, the Court of Appeal held that for a legitimate expectation to arise under the law there must be evidence of a promise or undertaking made by the respondent to that effect.

> Secondly it was contended on her behalf that the termination was in breach of her legitimate expectation that she could continue in her employment for the said period, in law for legitimate expectation to arise there must be evidence of a promise or undertaking made by the respondent to that effect We find no such evidence before the court. On that premise we find that her claim for breach of legitimate expectation is wholly unsustainable.

[59] Guided by those decisions, it will be incumbent upon the applicants to show that the respondents, in particular the second respondent or the State Government had acted in a way leading the applicants to believe that they have recognised the applicant's legal and beneficial ownership interest in Lot 6 or have acted in a way to lead the applicants to believe that a replacement or new title will be issued to either one of them.

[60] Up to the point time in 2014 when the applicants started communications with the second respondent, this court does not find any evidence of any representation or promise made by any local authority in Malacca which may have led or induced the applicants to believe that the respondents have recognised the applicants' ownership or either applicant will be given a continuation or replacement title for Lot 6.

[61] As for the letters dated 3 June 2014 (exh. A21, encl. 3), and 5 October 2018 (exh. A23, encl. 3), this court does not find that they contain any promise or undertaking that the second respondent will unconditionally act to issue the replacement title to the applicants. In fact, in those letters and later communication from the second respondent leading to the final letter dated 8 March 2022 (exh. A4, encl. 3), the second respondent displayed a consistent position that they were not ready to issue a continuation or replacement title either due to the following:

(i) lack of evidence supporting the applicants' claim;

(ii) the mechanism for the disposal of any claim under the Act has since the expiry of 12 years from the appointed day become non-functional;

(iii) the operation of s. 36 of the Act on the extinguishment and replacement of existing interests; and

(iv) that Lot 6 is actually Crown or State Land as evidenced by the Collector of Land Revenue letter dated 26 February 1948 to the Senior Inspector of Schools, Malacca.

[62] Whilst this court agrees with the applicants that the second respondent's changes in stance had led to confusion, as far as the point on legitimate expectation is concerned, this court does not find that the respondent's conduct gave rise to such expectation. In this court's view, the letters both dated 3 June 2014 and 5 October 2018 do not have the effect of estopping the respondents from denying the applicants' claim for reasons that the applicants have not sufficiently substantiated their claim that their interest went beyond just occupiers of Lot 6 and operators of the Sacred Heart Covent but included an interest as legal and beneficial owners.

[63] The fact of a long-term occupation itself does not evidence an acknowledgement or recognition of ownership that would give rise to such expectation. More must be shown that the respondent or the State Government had acted inconsistent with their title over the land which then only giving rise to the belief that the applicants have valid legal and beneficial ownership interest in the land.

Delay

[64] Part E of the applicants' affidavit in support in encl. 3 with the heading "Communications With The Respondents" describes how the applicants had communicated with the respondents on such many occasions to request for

the issuance of the replacement title under the Dutch Title Deed for Lot 6 so as to allow the applicants to apply for a final title deed under the National Land Code. The applicants state that they have always intended to engage with the respondents on an amicable solution of the matter. This application was only made in 2022 after all negotiations and clarifications had failed and the second respondent opened the way for the dispute to be referred to court *via* letter dated 8 March 2022.

[65] After carefully reading Part E, this court does not find any narrative on why there had been no effort by the applicants to present a claim under s. 53 of the Act on the appointed day. The series of communication between the applicants and the respondent exhibited as A20, encl. 3 commenced in 2014 *via* a letter dated 24 June 2014 from the applicant's previous solicitor's, Messrs Philip Chua. That letter referred to an earlier communication dated 3 June 2014 which was not exhibited. Thus, at best the earliest evidence of communication was on 3 June 2014.

[66] Going back to the Act, Form E to s. 53 requires the applicant to state the substance of the claim, the grounds for the claim and evidence to support the claim. Upon filing of Form E then the Director will investigate and make a determination. Clearly, a presentation of a claim under s. 53 and Form E would have been the statutory provided route that the applicants needed to have taken on or before the appointed day. However, it was not taken and there was no explanation why.

[67] In this court's view, the matter of presenting a claim for a replacement title is not one that should be done merely through letters and negotiations outside the application of the Act. The applicants should have taken steps to address their claim under the provisions of the Act. In *Sin Siang*, the Federal Court opined that a claim for a replacement title must be referred to the Commissioner under the Act and not directly to the court.

> ... Indeed as stated earlier, s. 38(2) provides that nothing in s. 38(1) shall affect the right of any person to make any claim under s. 53 whether by virtue of the interest in land that he has acquired through the 1948 sale. His claim is not for specific performance of a contract of sale. The Commissioner was accordingly bound statutorily to entertain his claim and to hold an enquiry under s. 54. In the circumstances, Mr Low's argument that there was no valid claim before the Commissioner must be rejected. **Under the 1963 Act, a claim relating to replacement titles must go before the Commissioner and not before the High Court.**
>
> (emphasis added)

[68] Failure to comply puts the applicants at risk that their interest will extinguish on the appointed day as provided under s. 36. To make it worse, a delay by the applicants in litigating their claim will affect their rights to any relief that the court may grant. The burden is on the litigant who has delayed rendering a satisfactory explanation for it.

[69] In this case, there has been 18 years delay since the appointed day of 1 January 1996 until the applicants' solicitor's letter dated 26.2014, and 26 years delay when calculated till 9 May 2022 when this application was filed. There was no explanation why the delay was allowed to happen. As decided by the Court of Appeal in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, even in cases where a right is exercisable *ex debito justitae*, a court may refuse relief to an indolent litigant:

> it is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The *maxim vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.

[70] The applicants argued that the issue of laches or acquiescence was not pleaded in any of the respondent's affidavits and therefore cannot be considered. In any event, the applicants argued that the respondents' own predicament to resolve various cases of unclear titles that is outstanding since the enforcement of the Act as evidenced by their letter dated 15 January 2016 lends support to the applicants' difficulties in resolving the claim, more so when the applicants had made the effort to continuously engage the respondent over the matter.

[71] Although the issue of laches or acquiescence was not specifically pleaded in the respondents' affidavits, they are implicit in the respondents' averments generally that the applicants had failed to act in accordance with the Act on or before the appointed day. In any event, the applicants' right to present and pursue the claim arose when the Act came into force. The delay is plain and should have been obvious not only to the applicants but also their solicitors. The applicants' inaction of 18 or 26 years whichever calculation is used clearly invites the consideration of laches and acquiescence which this court ought to take notice of *ex proprio motu*.

[72] Reference is made to the decision of the Court of Appeal *IB Capital Sdn Bhd v. Ivory Indah Sdn Bhd & Anor* [2021] CLJU 2348; [2021] 1 LNS 2348; [2022] 1 MLJ 860 where it was held:

> [287] ... laches is established when two conditions are fulfilled.
>
> [288] Obviously, there must be unreasonable delay in the commencement/prosecution of legal proceedings. Secondly, it has to be established that the consequences of delay render the grant of any relief unjust in all the circumstances.
>
> [289] The principle in this regard is to be found in the following passage of Lord Selborne's judgment in *Lindsay Petroleum Co v. Hurd* [1874] LR 5 PC 221 where he said:

But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[290] In *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202; Edgar Joseph Jr J (as he then was) said that laches was 'inaction with one's eyes open'. At p. 237 of the judgment he said:

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time.

He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant.

The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed) paras. 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open.

[73] Reference is also made to the decision of the Federal Court in *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] CLJU 244; [1978] 1 LNS 244; [1979] 1 MLJ 182 where the following was stated:

To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, *ie*, where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity. He is then said to be barred by his laches (*Halsbury's* 3rd edn, vol. 14, p. 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part.

Of course, acquiescence depends on 'knowledge, capacity and freedom'. It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a Court of equity will not allow a dormant claim to be set up when the means of resisting it have perished.

[74] The delay between 18 to 26 years is nothing short of incredible. This court cannot believe that the applicants had to take all that time to come to a decision on what they should do under the law. This court cannot accept as valid argument that the respondents' own predicaments in resolving unclear claims lends credence to the applicants' own predicament in trying to resolve the claim amicably. The applicants would not have been in the predicament if they had acted in accordance with the provisions of the Act. Chapter 2 of the Act would have allowed the applicants to appeal against the decision of the Director if it was not in their favour.

[75] The applicants' failure to present their claim under the Act and their delay in litigating the claim therefore shows that there has been acquiescence on the part of the applicants. The applicants had been in a long slumber and it is now too late for the applicants to become aware of what the applicant should have done. The applicants' inactivity has certainly caused a change in the

[76] The respondents' position as they cannot respond to the claims under the provisions of the Act and they would be disadvantaged to procure evidence that would probably have been more accessible had the claim been presented to the Director.

[77] By virtue of s. 36 of the Act, all pre-existing interest will extinguish on the appointed day and by coming into force of the National Land Code in 1965, any pre-existing interest the applicants may have had has therefore been extinguished.

Conclusion And Decision

[78] To conclude, this court finds that the applicants have not on the balance of probabilities shown that either of them have any pre-existing legal and beneficial ownership interest in Lot 6 on the appointed day.

[79] After considering all evidence and arguments this court finds that on the balance of probabilities, Lot 6 had belonged to the Crown or State land. There is no evidence sufficient to point otherwise. Whilst the State may have had issued titles to other Christian institutions such as the Christ Church Malacca, the Vicarage of Christ Church Malacca, Convent Infant Jesus School, Infant Jesus Convent and the Mosanic Lodge, each case must be judged on their own facts and circumstances.

[80] The applicants neglected and failed to act under the provisions of the Act and it is now too late for the applicants to argue that the respondents should now open a folio and register their interest in the Interim Register or that the Director to be compelled to exercise his powers and obligations under the Act. The National Land Code is now the primary law for the 1963 issuance and registration of land titles in the State of Melaka and all other states. To put in another way, the train has left the station.

[81] Therefore, this court does not find as contended by the applicants that the respondents' acts and decisions in particular the second respondent are illegal, irrational and procedurally improper. Although they may have acted haphazardly in not presenting a clear stance form the moment the applicants made their claim in 2014, they do not exhibit any bad faith towards the applicants. Their basic position has always been that Lot 6 was identified as the Portuguese Convent due to its use but not as record or acknowledgement of the ownership of either applicant.

[82] For all those reasons, this court finds no merit in the applicants' application to move this court to declare that either applicant is the legal proprietor of Lot 6 and to order that a continuation or replacement or new indefeasible title be issued and registered in the name of either applicant. The application is therefore dismissed in its entirety with costs of RM5,000.